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SUPREME COURT, U.S.
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In The Supreme Court of the United States

Christopher Mensah Dekoladenu
PETITIONER

v.

Alberto R. Gonzales, Attorney General
RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A difficult and recurring question in American immigration policy is how much procedural protection we should afford aliens in removal proceedings. On the one hand, some amount of process is not only consistent with traditional notions of fairness, but necessary to ensure Due Process. On the other, reality dictates that every delay works to the advantage of the alien. In balancing these considerations, Congress decided in the Illegal Immigration Reform and Immigrant Responsibility Act to severely curtail the procedural rights of aliens by limiting them to one, single motion to reopen. The question presented in this case is whether this balancing point should be judicially altered by depriving a substantial number of aliens—those granted voluntary departure—of their one and only motion to reopen.

PARTIES TO THE PROCEEDINGS

Petitioner is Christopher Mensah Dekoladenu.

Respondent is Alberto R. Gonzales, Attorney General.

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In The Supreme Court of the United States

Christopher Mensah Dekoladenu
PETITIONER

v.

Alberto R. Gonzales, Attorney General
RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Christopher Mensah Dekoladenu, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The judgment of the court of appeals denying the Petitioner's petition for rehearing *en banc*, dated November 8, 2006, is unreported (App. A, *infra*, 1a-2a). The judgment of the court of appeals denying the Petitioner's petition for review, dated August 18, 2006, is reported at *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006) (App. B, *infra*, 3a-20a).

The judgments of the Board of Immigration Appeals ("BIA"), dated June 9, 2005 (App. C, *infra*, 21a-23a), and August 18, 2004 (App. D, *infra*, 24a-26a), are unreported.

JURISDICTION

The judgment of the court of appeals denying the Petitioner's petition for rehearing *en banc* was entered on November 8, 2006 (App. A, *infra*, 1a-2a). On February 5, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 8, 2007. On February 28, 2007, the Chief Justice further extended the time to and including March 22, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition are the pertinent statutory provisions: 8 U.S.C. § 1229a(c)(7)(A) (App. E, *infra*, 27a); 8 U.S.C. § 1229c(d)(1) (App. F, *infra*, 28a); and 8 C.F.R. § 1003.2(d) (App. G, *infra*, 29a).

STATEMENT OF THE CASE

This case considers whether the timely filing of a motion to reopen tolls an alien's voluntary departure period pending its adjudication *or* whether the right to reopen is implicitly forfeited via acceptance of voluntary departure. Of the six circuit courts to consider the matter, four favor tolling over forfeiture.[1]

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[1] *Kanivets v. Gonzales*, 424 F.3d 330 (3rd Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe v. United States AG*, 453 F.3d 1325 (11th Cir. 2006); *Cf. Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006), *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006).

I. Statutory Background

This statutory background for the question presented involves the intersection of two important forms of relief in immigration law—the motion to reopen and voluntary departure.

The motion to reopen is a procedural device which allows an alien ordered removed from this country to reopen his case in light of new, previously unavailable evidence. *See* 8 U.S.C. § 1229a(c)(7)(B); 8 C.F.R. § 1003.2(c). For example, although an alien might have conceded at his original hearing that he has no entitlement to remain in the United States, some event may occur thereafter which establishes such an entitlement (*i.e.*, the alien marries a United States citizen). The motion to reopen allows the alien to reopen his case to seek adjudication of the new entitlement, which might prevent his impending deportation.[2] The motion dates back to at least 1916, and prior to the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) ("IIRIRA"), was given liberal treatment. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1283 (9th Cir. 2005).

Voluntary departure is another longstanding form of relief, which represents a mutually beneficial agreement between an alien and the government in which the former agrees to leave the country on his own dime, within a period of time set by the Immigration Judge ("IJ"). *See* 8 U.S.C. § 1229c. It is attractive to an alien because in addition to avoiding the stigma that attaches to forcible deportation, he also avoids the (5) five or ten (10) year penalty associated with an order of removal. *See* 8 U.S.C. § 1182(a)(9)(A). Voluntary

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[2] The motion to reopen has been compared to the motion for a new trial on the basis of newly discovered evidence pursuant to Federal Rule of Criminal Procedure 33. *See White v. INS*, 6 F.3d 1312, 1315 (8th Cir. 1993).

departure has its risks, however, because it exposes the alien to civil fines and a ten (10) year penalty if he fails to timely depart. *See* 8 U.S.C. § 1229c(d).

The "Catch-22" in this case is that, on the one hand, aliens in removal proceedings have a statutory right to one motion to reopen. *See* 8 U.S.C. § 1229a(c)(7)(A) ("An alien may file one motion to reopen proceedings under this section."). On the other hand, however, the voluntary departure statutes give an alien who has accepted a grant of voluntary departure two equally unsatisfactory options. First, if the alien stays in the United States beyond his voluntary departure period to give the BIA sufficient time to adjudicate the motion, the alien becomes statutory ineligible for relief. *See* 8 U.S.C. § 1229c(d) (providing that aliens overstaying their voluntary departure period are subject to a civil fine and a ten-year period of ineligibility for, *inter alia*, cancellation of removal and adjustment of status). Second, if the alien departs the United States during the voluntary departure period, his motion to reopen is deemed withdrawn. *See* 8 C.F.R. § 1003.2(d).

II. Factual Background

Christopher Dekoladenu is a native and citizen of Ghana who entered the United States in September of 1998 as a nonimmigrant visitor for pleasure. Although only authorized to stay in this country for six months, Mr. Dekoladenu remained beyond that time. Thereafter, he was placed in removal proceedings.

Mr. Dekoladenu conceded removability but petitioned for relief from removal in the form of voluntary departure. *See* 8 U.S.C. § 1229c(a). On March 6, 2003, the IJ granted voluntary departure in lieu of removal on or before July 7, 2003. On July 7, 2003, Mr. Dekoladenu filed a motion to reopen. The basis of the motion was a recently approved ETA

Form 750, Alien Employment Certification, a pending Form I-140, Immigrant Petition for Alien Worker, and a pending Form I-485, Application to Register Permanent Residence or Adjust Status. These immigration forms involve Mr. Dekoladenu's attempt to obtain an employment-based immigrant visa, and ultimately, to adjust his status based on that visa. *See* 8 U.S.C. § 1153(b) (employment-based visa); 8 U.S.C. § 1255 (adjustment of status).

The IJ denied Mr. Dekoladenu's motion to reopen on July 30, 2003 because his failure to depart within the prescribed voluntary departure period was said to render him statutorily ineligible for adjustment of status. *See* 8 U.S.C. § 1229c(d).[3] Mr. Dekoladenu filed a motion to reconsider with the IJ, which was denied on October 20, 2003. He then appealed to the BIA, which affirmed the IJ on August 18, 2004, citing the same statute (App. D, *infra*, 24a-26a). Mr. Dekoladenu appealed this decision of the BIA to the Fourth Circuit (case number 04-2164 before the Fourth Circuit).

Before reaching the merits of the case, the Fourth Circuit remanded to the BIA on March 11, 2005 at the Government's request. The purpose of the remand was to assess whether Mr. Dekoladenu was provided proper notice of the consequences of failing to depart within the prescribed

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[3] The basis for Mr. Dekoladenu's motion to reopen, adjustment of status based on a pending employment-based visa petition, is the same as the alien in *Kanivets v. Gonzales*, 424 F.3d 330, 332 (3rd Cir. 2005). The aliens in *Sidikhouya v. Gonzales*, 407 F.3d 950, 951 (8th Cir. 2005), and *Ugokwe v. United States AG*, 453 F.3d 1325, 1327 (11th Cir. 2006), sought reopening to pursue adjustment of status based on marriage to a United States citizen, while the aliens in *Azarte v. Ashcroft*, 394 F.3d 1278, 1280-81 (9th Cir. 2005), and *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 388 (5th Cir. 2006), sought reopening to further pursue cancellation of removal. In all of these cases, the statutory bar at 8 U.S.C. § 1229c(d) was said to apply.

voluntary departure period. On June 9, 2005, the BIA concluded that Mr. Dekoladenu had, in fact, received proper notice, and reinstated its previous decision dismissing his appeal concerning his motion to reopen (App. C, *infra*, 21a-23a). Mr. Dekoladenu then appealed this decision of the BIA to the Fourth Circuit (case number 05-1737 before the Fourth Circuit).

On August 18, 2006, the Fourth Circuit denied Mr. Dekoladenu's consolidated petitions for review (App. B, *infra*, 3a-20a), and on November 8, 2006, the Fourth Circuit denied Mr. Dekoladenu's petition for rehearing *en banc* (App. A, *infra*, 1a-2a).

REASONS FOR GRANTING THE PETITION

Through enactment of IIRIRA, Congress clearly *did* say that aliens in removal proceedings would be limited to one motion to reopen. Congress did *not* clearly say, however, that a significant portion of aliens in removal proceedings—those granted voluntary departure—would be deprived of even one such motion. This Court should take this case to prevent the Fourth and Fifth Circuits from eroding the procedural rights of aliens in removal proceedings.

I. Tolling Is The Proper Resolution Of The Tension Between The Voluntary Departure And Motion To Reopen Statutes

The motion to reopen statute states in simple terms that "[a]n alien may file one motion to reopen proceedings. . ." *See* 8 U.S.C. § 1229a(c)(7)(A). Such motion must be filed "within 90 days" of the final order of removal. *See* 8 U.S.C. § 1229a(c)(7)(C)(i). Notwithstanding the right to reopen, however, an alien granted voluntary departure has at most 120 days to depart. *See* 8 U.S.C. §§ 1229c(a)(2)(A), (b)(2). Given

that the BIA typically does not adjudicate motions to reopen in the relatively short 120 day period, and cannot extend the voluntary departure period pending the adjudication of the motion, a strict reading of the 120 day period would establish the absurd result of "allow[ing] aliens subject to voluntary departure to file motions to reopen but . . . simultaneously preclud[ing] the BIA from issuing decisions on those motions." *See Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005).

To avoid such absurdity, and to give effect to *both* the motion to reopen and voluntary departure statutes, the voluntary departure period must be tolled pending adjudication of the motion to reopen by the BIA. *See United States v. Wilson*, 503 U.S. 329, 334 (1992) (holding that statutory interpretation must avoid absurd results); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted) (holding that statutory interpretation must give effect, if possible, to all parts of a statute).

Not only does tolling avoid the "Catch-22" situation clearly recognized by the majority of circuit courts of appeal to reach the issue, the propriety of tolling in similar contexts is firmly established in law. *ICC v. Locomotive Engineers*, 482 U.S. 270 (1987), and *Stone v. INS*, 514 U.S. 386 (1995), together stand for the proposition that tolling is an appropriate vehicle to resolve a perceived statutory conflict resulting from the interaction of motions and filing deadlines.

Locomotive Engineers considered the effect of a motion to reconsider of an order of the Interstate Commerce Commission ("ICC") on the 60-day appeal deadline for appeal of the order set forth in the Hobbs Act. *Locomotive Engineers*, 482 U.S. at 284-86. Although it was uncontroverted that the appeal in that case was filed well beyond 60 calendar days, "it was nonetheless effective, because the timely [motion to reconsider] *stayed* the running of the . . . limitation period until the [motion] had been acted on by the [ICC]." *Id.* at 284 (emphasis added).

Less than a decade after *Locomotive Engineers*, the intersection of motions to reconsider and appeal deadlines was again considered in *Stone* in the context of immigration law. Although the Court ultimately rejected the "normal tolling rule" embodied in the Hobbs Act (which also applies to immigration proceedings),[4] it did so only because Congress may depart from those principles where appropriate. *Id.* at 393-98. Here, tolling as a proper resolution was jettisoned because if it did apply, "aliens subject to deportation orders might well face a Hobson's choice . . . [a choice that] Congress might not have wished to impose on the alien." *Id.* at 399.

Tolling in the case *sub judice* is consistent with *Locomotive Engineers* given its ability to reconcile statutory tension between motions and statutory deadlines. Tolling is complementary with *Stone* because while in that case a Catch-22 situation required *abandoning* the default tolling rule, here a similar Catch-22 situation requires its *adherence*. Given the case law establishing its use in a similar context, its flexibility in avoiding absurdity, and its ability to give effect to all statutory provisions, tolling is the best resolution of the question presented.

A. The INA Must be Read to Require Tolling Given The Well-Settled Rule That Ambiguities In Deportation Statutes Be Construed In Favor Of The Alien

In spite of the majority tolling rule adopted by several circuit courts of appeal, the Fourth and Fifth Circuit have adopted a forfeiture theory as an alternate resolution of the

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[4] The adoption of the Hobbs Act in immigration proceedings continues to this day. *See* 8 U.S.C. § 1252(a)(1) (holding that judicial review of final orders of removal are governed by the Hobbs Act *except as provided in 8 U.S.C. § 1252(b)*).

statutory tension. Under their reasoning, an alien implicitly waives their statutory right to reopen by accepting voluntary departure. *See Dekoladenu v. Gonzales*, 459 F.3d 500, 506 (4th Cir. 2006); *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389-90 (5th Cir. 2006). Although this theory may hold some appeal, and in fact might be considered a wiser legislative choice, it was not Congress's choice.

The motion to reopen statute states in simple terms that "[a]n alien may file one motion to reopen proceedings..." *See* 8 U.S.C. § 1229a(c)(7)(A). There is clearly no exception for aliens granted voluntary departure, who would have forfeited their right to reopen under the theory of the Fourth and Fifth circuits. If that result were desired, the statute might have read: "an alien, *except one who has accepted voluntary departure under 8 U.S.C. § 1229c*, may file one motion to reopen proceedings."

Similarly, the voluntary departure statute provides certain consequences which can arise from accepting such relief. *See* 8 U.S.C. § 1229c(d) (providing for civil penalties and a period of ineligibility for those aliens who overstay their voluntary departure period). However, nowhere in that statute is forfeiture mentioned. If that result were desired, the statute might simply have read: "an alien who accepts a grant of voluntary departure under this section *forfeits their right to one motion to reopen under 8 U.S.C. § 1229a(c)(7)(A)."*

Apart from the clear omission of the idea of forfeiture from both the motion to reopen and voluntary departure statutes, Congress could have resolved the issue in even more specific terms. Congress might have provided:

> VOLUNTARY DEPARTURE PERIOD NOT AFFECTED- Except as expressly agreed to by the Secretary of Homeland Security in writing in the exercise of the Secretary's discretion before the expiration of the period allowed for

> voluntary departure, no *motion*, appeal, application, petition, or petition for review shall affect, reinstate, enjoin, delay, stay, or *toll* the alien's obligation to depart from the United States during the period agreed to by the alien and the Secretary. (emphasis added). Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437 § 208, 109th Cong. (2006); Comprehensive Immigration Reform Act of 2006, S. 2611 § 211, 109th Cong. (2006). Border Security and Immigration Reform Act of 2007 S. 330 § 211, 110th Cong. (2007).

As Congress did not, and has not, passed as law any language similar to that above, or any other endorsement of forfeiture theory, the unmistakable conclusion is that, *at best*, the statutory regime is ambiguous concerning the intersection of motions to reopen and voluntary departure.[5]

Assuming such ambiguity, however, the Petitioner must prevail because of the long-standing rule that ambiguities in deportation statutes must be resolved in favor of the alien. *See INS v. St. Cyr*, 533 U.S. 289, 320 (2001). Articulating the reasons behind construing ambiguity in favor of the alien, this Court has stated:

> We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo v. Carmichael*, 332 U.S. 388. . . . Such a forfeiture is a penalty.

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[5] Further evidence of ambiguity could be gleaned from a head-count of the federal judges to disagree on the issue presented.

> To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the *narrowest* of several possible meanings of the words used. *INS v. Errico*, 385 U.S. 214, 225 (1966) (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (emphasis added).

The stakes are quite high for Petitioner, as described in the above passage. This Court must be faithful to the rule requiring that Congress be clear if it chooses to impose the hardship which accompanies deportation. If this Court finds ambiguity in the statutes regarding the issue presented, the balance must be tipped in the Petitioner's favor.

B. No Deference Should Be Given To The BIA's Decision Below

The scope of deference given administrative agencies under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), was recently curtailed. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), this Court held that that an agency interpretation only "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226-27 (emphasis added). The rationale behind the decision was an inherently democratic one. *See* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 41-42 (1990). While gaps left in statutes are properly considered delegations to the agencies who administer the

statutes to fill them in, Congress could not have intended informal agency action, which inherently involves little agency expertise, to receive deference.

Applying *Mead*, the Ninth Circuit has held that an unpublished opinion of the BIA, authored by a single Board member, should not be accorded *Chevron* deference. *See Garcia-Quintero v. Gonzales*, 455 F.3d 1006 (9th Cir. 2006). Although clearly the BIA has been delegated authority by the Attorney General to make rules carrying the force of law, unpublished decisions are not promulgated in the exercise of that authority because they are non-precedential.[6]

The Second Circuit has also considered the effect of *Mead* in the context of a BIA opinion, holding on similar reasoning that a BIA decision summarily affirming an IJ's opinion below should not be given *Chevron* deference. *See Shi Liang Lin v. United States Dept. of Justice and Attorney General Gonzales*, 416 F.3d 184 (2d Cir. 2005).

In spite of the narrowed scope of *Chevron*, and the holdings of its sister circuits applying *Mead*, the Fourth Circuit held below that "even if we were to find that the statute was silent or ambiguous . . . we would have to defer to the BIA's interpretation of the statutes it administers." *Dekoladenu*, 459 F.3d at 507.

This conclusion by the Fourth Circuit is erroneous. The BIA's decisions in this case, of August 18, 2004 and of June 9, 2005 (App. C and D, *infra*, 21a-26a), were both authored by a single board member in an unpublished, non-precedential fashion. The BIA made the specific choice *not* to avail itself of the authoritative forms of action it could taken, a published, precedential opinion, which would qualify its action as the exercise of the authority delegated to it by Congress to make

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[6] Precedential decisions of the Board of Immigration Appeals, in contrast, must be decided by a three-member panel or en banc, and would be granted *Chevron* deference.

rules carrying the force of law. *See* 8 C.F.R. § 1003.1(g) ("selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents."). Given its choice, the BIA's unauthoritative approach is due no deference.[7]

According *Chevron* deference is also inappropriate because federal regulations and BIA policy both hold that referral to a three-member panel is appropriate when the case presents the "need to establish a precedent construing the meaning of laws, regulations, or procedures," and also the "need to resolve a case or controversy of major national import." *See* 8 C.F.R. § 1003.1(e)(6)(ii), (iv); BIA Prac. Man., Ch. 1.3(a)(i) (rev.6/15/04), *available at* http://www.usdoj.gov/eoir/bia/qapracmanual/BIA_Practice_Man_FullVer.pdf ("[A] single Board Member decides cases *unless* the case falls into one of six categories that require a decision by a panel of three Board Members [such as] the need to establish a precedent construing the

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[7] In sharp contrast to the unauthoritative adjudication by the BIA of the petitioner's case are two examples of authoritative action which could have been taken, but were not. First, the Department of Justice could have updated its longstanding position that it "has not adopted any position" on the effect of voluntary departure on motions to reopen. *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10, 312, 10,325-26 (March 6, 1997). Second, the BIA cold have decided the issue *en banc* or via a 3-member panel in a precedential opinion. While this option was used to resolve the issue under a pre-IIRIRA statutory regime, it has not since been utilized. *Compare Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), *with Matter of Zmijewska*, 24 I&N Dec. 87, 93 n.3 (BIA 2007) (3-member panel of BIA, in a precedential opinion authored February 21, 2007, noting current circuit split but declining to consider it or acknowledge its practice of resolving the issue via non-precedential, single board member opinions).

meaning of laws, regulations or procedures.") (emphasis added). Given that this case clearly implicates both needs, and that the BIA simply does not have authority to disregard regulations established by the Attorney General, *see Matter of Anselmo*, 20 I&N Dec. 25, 30 (BIA 1989), no deference is due. *See Morton v. Ruiz*, 415 U.S. 199, 235-37 (1974) (refusing to defer where agency violated its own policies).

Finally, *Chevron* deference cannot be accorded to the BIA's specific resolution of the issue presented because it is an impermissible interpretation of current law. In a few short paragraphs, the BIA simply cited *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), and considered the matter resolved. That case was decided before IIRIRA, which made remarkable statutory changes concerning *both* motions to reopen and voluntary departure. Neither the Fourth nor Fifth Circuits rely on *Shaar*, but instead adopt their own resolution via what this petition has named forfeiture theory. While forfeiture theory might itself be a permissible interpretation of current law, the BIA's simple recitation of a superceded case is not.

Accordingly, because the BIA refused to speak authoritatively on the issue presented, in contravention of its own regulations and policy, and because the substance of its paltry decision is an impermissible interpretation of current law, this Court is clearly has no duty to defer under *Chevron*.

II. The Fourth Circuit's Forfeiture Theory Is Unpersuasive And Inconsistent With Basic Notions Of Fairness As Articulated By The BIA

Prior to the Fourth Circuit's decision in *Dekoladenu*, twelve of fifteen circuit judges had concluded that the INA must be read to require tolling of the voluntary departure period pending the resolution of a motion to reopen. The three judges who disagreed with the majority approach did so not because the statutory regime required a contrary reading, but

instead because the BIA's interpretation was thought permissible under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). *See Banda-Ortiz v. Gonzales*, 445 F.3d 387, 391 (5th Cir. 2006) (panel opinion written by Garza, J., and joined by Jolly, J.) ("The BIA has *reasonably interpreted* the governing statutes in light of the purposes of the voluntary departure scheme . . .") (emphasis added); *Sidikhouya v. Gonzales*, 407 F.3d 950, 953 (8th Cir. 2005) (Loken, J., dissenting) ("I cannot agree with this *undeferential* interpretation . . . . This regulation clearly implies that no extension of voluntary departure may be granted . . . , a *reasonable construction* of the governing statutes . . .") (emphasis added). Under such circumstances, the Fourth Circuit took the bold position that an alien's forfeiture of their right to reopen upon accepting voluntary departure was not only a reasonable construction of the INA, but was *the only one permissible*. The court's reasoning rested on two main conclusions. Both are unpersuasive.

First, the Fourth Circuit singled out the canon of construction which states that "a specific statutory provision controls a more general one." *Dekoladenu v. Gonzales*, 459 F.3d 500, 505 (4th Cir. 2006) (citing *Warren v. N.C. Dept. of Human Res.*, 65 F.3d 385, 390 (4th Cir. 1995); *Shawnee Tribe v. United States*, 405 F.3d 1121, 1129 (10th Cir. 2005)). In application of this canon, the court held that because "[t]he voluntary departure provision applies to *certain* removable aliens, i.e., those 'not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B),' while the motion to reopen provision applies to *all* aliens subject to removal," the more specific voluntary departure statute should control." *Id.* at 505-06 (emphasis in original). Accordingly, the "apparent conflict . . . between the two statutes disappears." *Id.* at 506.

As the Petitioner reads the Fourth Circuit's analysis, the court apparently believed that the requisite specificity to invoke

the specific-controls-the-general canon of construction refers only to *numerical* specificity. As such, where any two statutes conflict, one must simply count the number of individuals to which each applies. If there is any discrepancy, a court must find the statute applying to fewer individuals controlling.

Contrary to this interpretation, the cases cited by the Fourth Circuit itself reveal that the canon's trust is more limited—a statute more specific numerically *and concerning the applicable subject matter* will control a more general statute.

For example, the specific-controls-the-general canon was properly invoked in *Warren* because both statutes concerned the valuation of resources for determining food stamp eligibility, and also properly invoked in *Shawnee Tribe* because both statutes implicated the proper disposal of a specific parcel of federal land. In the case at hand, neither motions to reopen or voluntary departure can theoretically be considered a subset of the other. Accordingly, the specific-controls-the-general canon is inapposite.

Even if such canon were properly invoked, the Fourth Circuit's conclusion that the voluntary departure statute is more specific numerically is incorrect. While the Fourth Circuit correctly notes the limited applicability of voluntary departure (it is unavailable to aliens deportable as aggravated felons and terrorists, *see* 8 U.S.C. § 1229c(a)(1) (voluntary departure applies only to those aliens "not deportable under section 1227(a)(2)(A)(iii) [aggravated felons] or section 1227(a)(4)(B) [terrorists]")), it ignores the limited applicability of the motion to reopen—which is only available to those aliens in possession of new, material facts which could not have been discovered or presented at their former hearing. *See* 8 U.S.C. § 1229a(c)(7)(B), 8 C.F.R. § 1003.2(c)(1). As a practical matter, the Petitioner submits that the requirement of new, material facts disqualifies more aliens than does the disqualification of aggravated felons and terrorists.

Accordingly, the motion to reopen statute is more specific than the voluntary departure statute, and under the Fourth Circuit's reasoning, must control.

As a second reason for its nuanced position, the Fourth Circuit held that the tolling approach "would have the effect of rendering the time limits for voluntary departure meaningless." *Dekoladenu,* 459 F.3d at 506. As the voluntary departure statute specifically requires that the voluntary departure period "shall not exceed 120 days," a judicially created tolling rule would be contradictory to the firm intent of Congress not to allow additional time beyond that period.[8]

Contrary to the Fourth Circuit's position, equitable tolling does not cause a time period to be "exceed[ed]" or "render[ed] . . . meaningless." Rather, it simply stops the clock on the time period from running. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990) (discussing principles of equitable tolling); Black's Law Dictionary (8th ed. 2004) (defining "toll" as "to stop the running of" a time period). Not only is the concept of tolling firmly rooted in our law as a *general* background principle which Congress was presumptively aware of when it enacted IIRIRA, *Stone* and *Locomotive Engineers, supra*, stand for the proposition that the tolling concepts inherent in the Hobbs Act extend *specifically* to immigration law except to the extent that such principles are specifically abandoned. Given that no provision of the Immigration and Nationality Act specifically requires abandoning tolling in the circumstances in the case at hand, its adherence is a proper resolution of statutory tension. Furthermore, the Fourth Circuit's tolling reasoning is flatly contradicted by the rejection of its exact argument in other

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[8] The Fifth Circuit also felt tolling inappropriate based on a belief that tolling would "extend" the voluntary departure period beyond the period authorized by Congress. *See Banda-Ortiz v. Gonzales*, 445 F.3d 387, 390 (5th Cir. 2006).

circumstances. *See, e.g., Hibbs v. Winn*, 542 U.S. 88 (2004) (allowing for equitable tolling despite clear statement in relevant limitations statute, 28 U.S.C. § 2101(c), that petition for writ of certiorari "shall be taken or applied for within ninety days"); *Locomotive Engineers, supra* (allowing for equitable tolling despite clear language in 28 U.S.C. § 2344 that petition for review of an agency order must be filed "within 60 days after its entry").[9]

Finally, aside from the Fourth Circuit's two unpersuasive justifications for its position, one crucial problem remains. If Congress had intended IIRIRA to require aliens granted voluntary departure to completely forfeit any right to reopen their case, wouldn't one expect that Congress would accompany such a significant deprivation of procedural rights with adequate *notice* to the alien? After all, the purported basis of the Fourth and Fifth Circuit's forfeiture theory is not simply that the government takes away certain rights and gives others at its choosing, but that there is a *knowing agreement* by the alien who enters the bargain. *See Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389 (5th Cir. 2006) ("Voluntary departure is the result of an *agreed-upon* exchange of benefits between an alien and the Government.") (emphasis added).

A difficult case for the Fourth Circuit to reconcile on this point is *Matter of Ocampo-Ugalde*, 22 I&N Dec. 1301 (BIA 2000). In that case, an alien in removal proceedings, represented by counsel, sought and was granted voluntary departure at a preliminary hearing. *Id.* at 1301-02. Although federal regulations clearly require wavier of appeal for aliens who accept voluntary departure at such an early time, *see* 8

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[9] Even the (former) INS does not seem to share the Fourth Circuit's broad-based dislike of tolling as a concept. *See Chu v. INS*, 875 F.2d 777, 779 (9th Cir. 1989) (in which the (former) INS argued for tolling in the context of a reconsideration motion), *overruled by Stone v. INS*, 514 U.S. 386 (1995).

C.F.R. § 1240.26(b)(1)(i)(D), the alien thereafter sought to appeal nevertheless. *Id.* at 1302. The issue presented was thus whether voluntary departure was properly granted without an *express* waiver of the right to appeal. *Id.*

Holding the failure of the IJ to require *express* waiver fatal, the BIA refused to bind the alien by mere acceptance of a grant of voluntary departure. *Id.* at 1304 ("we find it critical that the record must clearly demonstrate that the right to appeal was actually, *and not merely constructively*, waived by the alien") (emphasis added). In support thereof, the BIA noted the "due process implications of construing an 'implicit' waiver of the right to appeal." *Id.*

If the BIA thinks it imprudent to allow waiver of the right to appeal for represented aliens accepting voluntary departure, where regulations *explicitly* required such waiver in unambiguous terms, the Fourth and Fifth Circuit's theory of waiver of another important procedural right, *sub silentio*, is hardly plausible.

III. Resolution Of The Well-Developed Circuit Split Should Not Be Foregone Based On The Mere Possibility of Regulations By The Department Of Justice

In opposing a petition for writ of certiorari in *Moorani v. Gonzales*, No. 06610, a case presenting the same issue as in the case *sub judice*, the Government recently stated that review of the tolling issue is unwarranted because "the Department of Justice has determined that it will promulgate regulations specifically regarding the tolling question presented by this case." Brief for the Respondent in Opposition p. 22. Although the Government concedes that the Department of Justice promised to address the issue back in 1997, *id.* p. 23 n8, it now argues that the Petitioner should nevertheless "await the issuance of such regulations" notwithstanding the passage of a

decade of time in which Petitioners Dekoladenu, Banda-Oritz, Moorani, Sidikhouya, Ugokwe, Kanivets, and Azarte tirelessly pursued their cases before the federal circuit courts of appeal. *Id.* at 23.

The Department of Justice's newly-found resolve to address the issue is simply insufficient. Aside from the obvious observation that the Government did not even attempt to give a timeframe in which such regulations would be proffered, other problems render such regulations beside the point. First, there is no indication that such regulations would be applied retroactively.[10] If they do not so apply, they would be beyond the purview of Petitioner Dekoladenu. Second, even assuming an administrative will to require retroactivity, the Government will face the argument that that applying such a rule to individuals who relied upon tolling would violate their Due Process rights under the Fifth Amendment. *See generally INS v. St. Cyr*, 533 U.S. 289 (2002) (finding that Congress's retroactive repeal of suspension of deportation would not apply to aliens who entered into plea agreement in reliance upon such relief).

In short, the Department of Justice's regulations, assuming they will even occur, are simply too little, too late.

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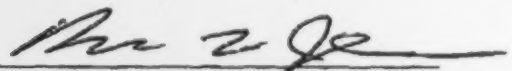
[10] In fact, Congressional bills attempting to resolve the issue presented by refusing to allow tolling *explicitly* state that, if passed, they would not apply retroactively. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437 § 208, 109th Cong. (2006); Comprehensive Immigration Reform Act of 2006, S. 2611 § 211, 109th Cong. (2006); Border Security and Immigration Reform Act of 2007 S. 330 § 211, 110th Cong. (2007) (all stating that "the amendments made by this section shall apply with respect to all orders granting voluntary departure under section 240B of the Immigration and Nationality Act (8 U.S.C. 1229c) made *on or after the date that is 180 days after the enactment of this Act.*") (emphasis added).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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March 22, 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 8, 2006

No. 04-2164
A78-354-375

CHRISTOPHER MENSAH DEKOLADENU

Petitioner

v.

ALBERTO R. GONZALES, Attorney General

Respondent

No. 05-1737
A78-354-375

CHRISTOPHER MENSAH DEKOLADENU

Petitioner

v.

ALBERTO R. GONZALES, Attorney General

Respondent

On Petition for Rehearing En Banc

The Petitioner's petition for rehearing en banc, the respondent's opposition to the petition, and the petitioner's reply to the opposition were submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for the En Banc Court.

For the Court,

/s/ Patricia S. Connor

Clerk

APPENDIX B

Published, 459 F.3d 500

United States Court of Appeals
For The Fourth Circuit.

Christopher Mensah DEKOLADENU, Petitioner,
v.
Alberto R. GONZALES, Attorney General, Respondent.

No. 04-2164

Christopher Mensah Dekoladenu, Petitioner,
v.
Alberto R. Gonzales, Attorney General, Respondent.

No. 05-1737

On Petition for Review of an Order of
the Board of Immigration Appeals.
(A78-354-375)

Argued: March 16, 2006

Decided: Aug. 18, 2006

Before MOTZ, KING, and GREGORY, Circuit Judges.

Petition for review denied by published opinion. Judge Motz wrote the opinion, in which Judge King concurred. Judge Gregory wrote a separate opinion concurring in the judgment.

COUNSEL

*502 ARGUED: Randall Lee Johnson, Johnson & Associates, Arlington, Virginia, for Petitioner. Carol Federighi, Senior Litigation, United States Department of Justice, Office of Immigration Litigation, Washington, D.C., for Respondent. ON BRIEF: Peter D. Keisler, Assistant Attorney General, M. Jocelyn Lopez Wright, Assistant Director, United States Department of Justice, Office of Immigration Litigation, Washington, D.C., for Respondent.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

An Immigration Judge (IJ) denied Christopher Mensah Dekoladenu's motion to reopen removal proceedings and also denied his subsequent motion to reconsider that decision. The Board of Immigration Appeals (BIA) affirmed, finding that Dekoladenu was ineligible for relief because he had overstayed his voluntary departure date. Dekoladenu petitions for review, arguing that his timely filed motion to reopen should have tolled the voluntary departure period. For the reasons set forth below, we deny Dekoladenu's petition for review.

I.

Dekoladenu is a citizen of Ghana who entered the United States on a six-month non-immigrant visa in 1998. He applied for asylum and withholding of removal in June 2000. Two months later, the Immigration and Naturalization Service ordered Dekoladenu to appear at removal

proceedings. Dekoladenu conceded removability but indicated that he intended to file applications for "political asylum, withholding of removal, adjustment of status ..., and alternatively, voluntary departure."

On September 6, 2002, Dekoladenu's employer successfully applied for an Alien Employment Certification; this certification is a prerequisite for an employer seeking a work visa on an alien's behalf. See 8 U.S.C. § 1153(b)(3)(C) (2000). Dekoladenu's employer then filed an I-140 "Immigrant Petition for Alien Worker" on his behalf on December 26, 2002. On the same day, Dekoladenu filed an I-485 "Application to Register Permanent Residence or Adjust Status." Dekoladenu then brought motions asking the IJ to either adjourn and continue or terminate the removal proceedings in light of his pending applications. On March 6, 2003, the IJ found Dekoladenu removable, implicitly denying both motions; the IJ granted Dekoladenu a voluntary departure date of July 7, 2003.

On July 7, 2003--the last day of his voluntary departure period--Dekoladenu filed a motion to reopen proceedings seeking adjustment of status in light of his pending I-140 and I-485 petitions. The IJ denied the motion to reopen. Dekoladenu then filed a motion to reconsider the denial of the motion to reopen. The IJ denied this motion as well. The BIA affirmed the decision of the IJ denying Dekoladenu's motion to reopen. [FN1]

FN1. While Dekoladenu's petition for review was pending, the Government moved to remand this case to the BIA to determine whether Dekoladenu had received proper notice about the consequences of failing to depart voluntarily, as required by 8 U.S.C. § 1229c(d) (2000). We

granted the Government's motion to remand. On June 9, 2005, the BIA held that Dekoladenu received proper notice and reaffirmed the denial of reconsideration. Dekoladenu again petitioned for review of the BIA's reaffirmance on the same grounds that he raised in his earlier petition.

***503** [1] Before us, Dekoladenu argues that the BIA (1) abused its discretion in refusing to stay his voluntary departure date while considering his motion to reopen, and (2) violated his due process rights by denying him a decision on his motion to reopen. We review the BIA's decisions on these questions of law de novo. See Nwolise v. INS, 4 F.3d 306, 309 (4th Cir.1993).

II.

Dekoladenu first argues that the BIA abused its discretion when it rejected his argument that his motion to reopen tolled the voluntary departure period. [FN2] The BIA denied Dekoladenu's appeal on the ground that Dekoladenu became ineligible for adjustment of status when he remained in the United States after the expiration of his voluntary departure period.

FN2. Dekoladenu also argues that the IJ's denial of his motion to reopen was an abuse of discretion. He maintains that the IJ should have granted his motion to reopen based on the concurrent filing rule, which allows aliens to request adjustment of status as long as a visa is "immediately available." See 8 C.F.R. § 245.2(a)(2)(i)(A) (2006). However, this question is not before us, as Dekoladenu did not appeal the IJ's denial of his motion to

reopen. Rather, this case arises from the BIA's rejection of Dekoladenu's motion to reconsider the IJ's denial of his motion to reopen. The BIA affirmed the denial of the motion to reconsider solely on the ground that Dekoladenu overstayed his voluntary departure date, and our review is thus limited to that issue.

[2] Dekoladenu asserts that the BIA's interpretation of the relevant statutes constitutes an abuse of discretion. Prior to analyzing the BIA's construction, however, we must first determine "whether Congress has directly spoken to the precise question at issue." Soliman v. Gonzales, 419 F.3d 276, 281 (4th Cir.2005) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). "If Congress's intention is clear, the inquiry ends there." Id. Only if a statute is silent or ambiguous do we need to determine whether the BIA's interpretation is reasonable in light of the statute. See Chevron, 467 U.S. at 843, 104 S.Ct. 2778. Accordingly, we turn to the statutes at issue here.

Removal proceedings are governed by 8 U.S.C. § 1229a (2000). This statute gives aliens the right to file one motion to reopen in order to present new facts or evidence. Section 1229a provides that "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." Id. § 1229a(c)(6)(C)(i). However, the regulations implementing this statute provide that "[a]ny departure from the United States ... occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion." 8 C.F.R. § 1003.2(d) (2006).

Another statutory provision, 8 U.S.C. § 1229c,

governs voluntary departure and allows an IJ to grant an alien the right to depart voluntarily "in lieu of being subject to proceedings under section 1229a." Id. § 1229c(a)(1). This statute states that, if an eligible alien requests voluntary departure prior to the completion of removal proceedings, as Dekoladenu did here, "permission to depart voluntarily ... shall not ***504** be valid for a period exceeding 120 days." [FN3] Id. § 1229c(a)(2)(A). An alien who fails to depart "within the time period specified" must pay a fine between $1,000 and $5,000 and will be ineligible for several forms of relief, including adjustment of status. See id. § 1229c(d).

FN3. The voluntary departure period for aliens who request voluntary departure at the conclusion of removal proceedings "shall not be valid for a period exceeding 60 days." 8 U.S.C. § 1229c(b)(2) (2000). Because the IJ gave Dekoladenu a 120-day voluntary departure period, we focus our analysis on section 1229c(a)(2)(A). We believe, however, that the two types of voluntary departure implicate the same principles.

[3] This case highlights the difficulty sections 1229a and 1229c create for aliens granted voluntary departure. "An alien may timely file a [motion to reopen], but if the BIA does not decide the [motion] within the period for voluntary departure, the alien loses the right to have a ruling [on his motion to reopen]," whether he complies with the voluntary departure period or not. Kanivets v. Gonzales, 424 F.3d 330, 334 (3d Cir.2005). As a practical matter, the BIA will rarely reach a decision on a motion to reopen before the end of the voluntary departure period. Thus, most aliens who are granted voluntary departure have no meaningful ability to

file a motion to reopen when they are seeking one of the forms of relief listed in § 1229c(d).

[4] For this reason, Dekoladenu asserts that we should interpret these two provisions so that a timely filed motion to reopen tolls the relevant voluntary departure period. We cannot agree. As discussed below, both the plain language of the statute and clear congressional intent explicitly limit the time allowed for voluntary departure and do not allow for judicial tolling of these limits.

In support of his tolling argument, Dekoladenu cites cases from other circuits that have adopted his interpretation of the statutory scheme. In Azarte v. Ashcroft, 394 F.3d 1278 (9th Cir.2005), the Ninth Circuit held that "in cases in which a motion to reopen is filed within the voluntary departure period ... the voluntary departure period is tolled during the period the BIA is considering the motion." [FN4] Id. at 1289. The Third, Eighth, and Eleventh Circuits have followed the Ninth Circuit's approach. See Ugokwe v. U.S. Att'y Gen., 453 F.3d 1325, 1331 (11th Cir.2006); Kanivets, 424 F.3d at 334-35; Sidikhouya v. Gonzales, 407 F.3d 950, 951- 52 (8th Cir.2005). But see Banda-Ortiz v. Gonzales, 445 F.3d 387, 391 (5th Cir.2006) petition for rehearing en banc denied, 458 F.3d 367, 2006 WL 2061132 (5th Cir. July 26, 2006) (holding by a divided panel that a motion to reopen does not toll the voluntary departure period).

FN4. In Azarte, the petitioners also requested a stay of removal when they brought their motion to reopen; therefore, the Ninth Circuit did "not reach the question whether filing a motion to reopen automatically tolls the voluntary departure period." Azarte, 394 F.3d at 1288 n. 20. However, in a later case, the Ninth Circuit held that

requesting a stay was unnecessary because "the timely filing of a motion to reopen or reconsider automatically tolls the voluntary departure period." Barroso v. Gonzales, 429 F.3d 1195, 1205 (9th Cir.2005).

Before the Azarte court turned to interpreting the statute at issue here, it provided a helpful overview of the history of voluntary departure and motions to reopen. See 394 F.3d at 1282-85. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). See Pub.L. No. 104-208, 110 Stat. 3009-546. Prior to IIRIRA, federal law provided for voluntary departure but ***505** imposed no specific time limits on the voluntary departure period. See 8 U.S.C. § 1254(e) (1994) (repealed 1996). Rather, individual IJ's exercised discretion in setting voluntary departure deadlines; "[i]n practice, voluntary departure was granted for generous periods of time." Azarte, 394 F.3d at 1284. As for motions to reopen, before IIRIRA's enactment, aliens had no statutory right to file a motion to reopen, but federal regulations allowed aliens to bring motions to reopen in order to present new information relevant to their status; these regulations also did not include a time limit. See id. at 1283.

Under the pre-IIRIRA statutory and regulatory scheme, both this court and the Ninth Circuit held that if an alien remained in the United States after the date set for voluntary departure, he could only obtain relief if exceptional circumstances existed. See Stewart v. INS, 181 F.3d 587, 596 (4th Cir.1999); Shaar v. INS, 141 F.3d 953, 956 (9th Cir.1998). A pending motion to reopen did not qualify as an exceptional circumstance, and therefore filing a motion to reopen did not toll the voluntary departure period. See Stewart, 181 F.3d at 596; Shaar, 141 F.3d at 957. The

Azarte court overruled Shaar, its earlier precedent, finding that "the rationales that underlay Shaar are no longer applicable after IIRIRA." Azarte, 394 F.3d at 1286. It concluded that the changes in the law effected by IIRIRA operated to toll the voluntary departure period when an alien files a motion to reopen. See id. at 1289.

The Ninth Circuit relied in particular on IIRIRA's express authorization of immigrants to file motions to reopen, a right previously available only pursuant to regulation. The Azarte court reasoned that failure to toll the voluntary departure period would "deprive[ ] the motion to reopen provision of meaning by eliminating the availability of such motions to those granted voluntary departure." Id. at 1288. The court found that tolling the voluntary departure period during the pendency of a timely-filed motion to reopen would be "more consistent with the statute as a whole" because such an approach "effectuate[s] both statutory provisions." Id.Azarte also held that tolling the voluntary departure period would avoid an "absurd result," i.e., the "nonsensical [notion] that Congress would have allowed aliens subject to voluntary departure to file motions to reopen but would have simultaneously precluded the BIA from issuing decisions on those motions." Id. at 1288- 89. For these reasons, the court held that interpreting IIRIRA to toll the voluntary departure period while an alien's motion to reopen is being considered is "most consistent with IIRIRA's legislative scheme." Id. at 1289.

[5] Although this approach holds some appeal, in our view the statutory scheme simply does not permit such an interpretation. First, interpreting the statute as Azarte did ignores the well-established canon of statutory construction that "a specific statutory provision controls a more general one." Warren v. N.C. Dept. of Human Resources, 65 F.3d

385, 390 (4th Cir.1995); see also Shawnee Tribe v. United States, 405 F.3d 1121, 1129 (10th Cir.2005) ("It is a fundamental canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs." (internal quotation marks omitted)). The voluntary departure provision applies to certain removable aliens, i.e., those "not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B)," while the motion to reopen provision applies to all aliens subject to ***506** removal. [FN5] Compare 8 U.S.C. § 1229c(a)(1) (2000) with id. § 1229a(c)(6)(A).

FN5. The statute does not guarantee voluntary departure even to eligible aliens. Rather, it provides that the Attorney General "may permit" eligible aliens to depart voluntarily, see 8 U.S.C. § 1229c(a)(1) (2000), and authorizes the Attorney General to issue regulations "limit[ing] eligibility for voluntary departure ... for any class or classes of aliens." Id. § 1229c(e). As a practical matter, only a relatively small percentage of removable aliens are granted voluntary departure. See, e.g., Executive Office for Immigration Review, FY 2005 Statistical Yearbook Q1 (indicating that 11 percent of removable aliens were granted voluntary departure in 2005).

Following the normal rule of statutory construction, the more specific voluntary departure provision governs in those limited situations in which it applies, and the apparent conflict the Azarte court found between the two statutes disappears. Thus, contrary to Azarte's suggestion, "eliminating the availability" of a motion to reopen to aliens granted voluntary departure does not "deprive [ ] the motion to reopen provision of meaning." Azarte, 394 F.3d at 1288.

Rather, this interpretation gives effect to both provisions. A motion to reopen remains available to all aliens, but an alien who requests voluntary departure will forfeit his right to a decision on his motion to reopen if the IJ grants his request.

[6] [7] Although this result may be harsh, it is hardly "nonsensical" or "absurd," as the Azarte court suggested. 394 F.3d at 1288-89. Voluntary departure is not a right, but a benefit. This benefit, unlike removal, permits aliens to "avoid[ ] the stigma of compulsory removal, permits the alien to select his or her own destination, and facilitates the possibility of return to the United States." Rife v. Ashcroft, 374 F.3d 606, 614 (8th Cir.2004); see also Ngarurih v. Ashcroft, 371 F.3d 182, 194 (4th Cir.2004) (finding that the statutory provisions governing voluntary departure "reveal[ ] Congress' intention to offer an alien a specific benefit--exemption from the ordinary bars on subsequent relief--in return for a quick departure at no cost to the government"). Because voluntary departure is a privilege that is only available to a subset of removable aliens, it is neither "absurd" nor "nonsensical" to require aliens who wish to reap the benefits of voluntary departure to give up their right to a resolution of a motion to reopen.

[8] As the Ninth Circuit itself noted in another case, "[t]he implied agreement underlying a voluntary departure order serves both parties. The government affords the alien a more convenient means of leaving the country, and, in exchange, the alien assures the government that he will not further press his right to remain in the country." Medina-Morales v. Ashcroft, 371 F.3d 520, 530 (9th Cir.2004). Thus, voluntary departure allows some aliens to make a deal with the government: they must give up certain rights in exchange for the benefits that flow from voluntary departure.

[9] On the other hand, to adopt the Azarte approach and mandate tolling of the voluntary departure period when an alien files a motion to reopen would have the effect of rendering the time limits for voluntary departure meaningless. If filing a motion to reopen automatically tolled the voluntary departure period, aliens who have been granted voluntary departure would have a strong incentive to file a motion to reopen in order to delay their departure. See INS v. Doherty, 502 U.S. 314, 323, 112 S.Ct. 719, 116 L.Ed.2d 823 (1992) ("[E]very delay works to the advantage of the deportable alien who wishes merely to remain in the United States."). As the Ninth Circuit acknowledged, when ***507** Congress enacted IIRIRA it "drastically limited the time allowed for voluntary departure." Azarte, 394 F.3d at 1285. The statute clearly states that the voluntary departure period shall not exceed 120 days, see 8 U.S.C. § 1229c(a)(2)(A) (2000), and a judicially created tolling provision contradicts the plain language of the statute and undermines the clear congressional intent. [FN6]

FN6. The dissent in the Fifth Circuit's recent decision in Banda-Ortiz maintains that a strict reading of the statutory time limit on voluntary departure "proves too much" because the BIA regularly tolls the voluntary departure period during an alien's appeal to the BIA. 445 F.3d at 395 (Smith, J., dissenting). The dissent contends that "[i]f the voluntary departure period cannot exceed sixty days under any circumstance, an alien would risk more than a motion to reopen when he elects voluntary departure; he would also put in jeopardy his right to any review of the IJ's decision." Id. But our interpretation of IIRIRA does not call into question the BIA's practice of tolling the voluntary departure period during the pendency of an appeal. The statutory

scheme treats appeals and motions to reopen very differently. An order of removal does not become final until the BIA has decided the appeal or the time period for appealing has expired. See 8 U.S.C. § 1101(a)(47)(B) (2000); see also In re A-M, 23 I & N Dec. 737, 743-44 (BIA 2005); 5 Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, Immigration Law and Procedure § 64.03[4][b] (rev. ed.2005). An alien is not bound by the voluntary departure period until the order of removal is final. See 8 U.S.C. § 1229c(b)(1); In re A-M, 23 I & N Dec. at 743. By contrast, motions to reopen do not disturb the finality of an order of removal. Thus, the BIA's practice of staying the execution of a removal order during a timely appeal finds justification in the statutory scheme, but no such statutory justification exists for motions to reopen.

[10] Accordingly, we cannot read IIRIRA as requiring tolling of the voluntary departure period when an alien files a motion to reopen. Rather, we believe that the statutory provisions governing motions to reopen and voluntary departure clearly indicate that filing a motion to reopen does not toll the voluntary departure period. [FN7] Accordingly, the BIA did not err when it rejected Dekoladenu's motion to reconsider on the ground that he had overstayed his voluntary departure date.

FN7. For this reason the Azarte court's reliance on "the well-established canon of construction that deportation statutes should be construed in favor of the alien" is misplaced. Azarte, 394 F.3d at 1289. This canon only comes into play when there are "ambiguities" in the statute. Kwai Fun Wong v. United States, 373 F.3d 952, 962 (9th

Cir.2004).

We note that even if we were to find that the statute was silent or ambiguous with respect to the effect of a motion to reopen on the voluntary departure period, we would have to defer to the BIA's interpretation of the statutes it administers. See INS v. Aguirre-Aguirre, 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) (citing Chevron, 467 U.S. at 842, 104 S.Ct. 2778). If Congress had not spoken directly to the issue before us, the question would become whether the BIA's decision "is based on a permissible construction of the statute." Id. (quoting Chevron, 467 U.S. at 843, 104 S.Ct. 2778) (internal quotation marks omitted). In our view the statute simply does not permit Dekoladenu's preferred interpretation: even if the tension between the two provisions at issue here revealed an ambiguity (and we do not believe it does), the BIA's construction of the statute is, for the reasons outlined above, clearly reasonable and therefore merits deference. Cf. Nwolise, 4 F.3d at 309 ("[W]here the BIA's interpretation of the statutory section is neither inconsistent [n]or unjustified, we [will] uphold the Board's construction which, in its estimation, will better serve the legislative intent and purpose." (internal quotation marks *508 omitted) (second alteration in original)). [FN8]

FN8. Contrary to the concurrence's suggestion, our opinion in this case does not decide the effect of a motion to reopen when an alien who has been granted voluntary departure seeks a form of relief not listed in 8 U.S.C. § 1229c(d). Because Dekoladenu sought adjustment of status--which is listed in § 1229c(d)--we need not reach this question. That said, in our view Congress's intent to limit the

voluntary departure period likely applies equally regardless of the type of relief sought in a motion to reopen. Indeed, the argument that a motion to reopen tolls the voluntary departure period is even less persuasive in cases in which the alien retains the ability to seek relief after the expiration of the voluntary departure period.

III.

[11] Dekoladenu also contends that the BIA's interpretation of sections 1229a and 1229c violates the Due Process Clause of the Fifth Amendment. According to Dekoladenu, the BIA's approach is arbitrary because an alien granted voluntary departure will only obtain a resolution of a timely filed motion to reopen if the IJ "happens to act" before the expiration of the voluntary departure period. Brief of Appellant at 7-8. We reject this argument because Dekoladenu has failed to state a due process claim.

[12] [13] In order to make out a due process claim, a claimant must "first establish that he had a property or liberty interest at stake." Smith v. Ashcroft, 295 F.3d 425, 429 (4th Cir.2002). Dekoladenu brought his motion to reopen seeking adjustment of status. Motions to reopen and requests for adjustment of status are purely discretionary forms of relief. See 8 U.S.C. § 1255 (2000); 8 C.F.R. § 1003.2(a) (2006). No property or liberty interest can exist when the relief sought is discretionary. See Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464-67, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981); see also Nativi-Gomez v. Ashcroft, 344 F.3d 805, 808 (8th Cir.2003) (holding that "[n]o person has a constitutionally protected liberty interest" in the discretionary privilege of adjustment of status); Smith, 295

F.3d at 430 ("On many occasions this circuit has held that discretionary statutory 'rights' do not create liberty or property interests protected by the Due Process Clause."). Accordingly, because Dekoladenu has neither a liberty nor a property interest in adjustment of status, he cannot make out a due process violation.

IV.

For the foregoing reasons, the petition for review is DENIED.

GREGORY, Circuit Judge, concurring in the judgment:

Although I agree with the majority's resolution of Dekoladenu's due process claim and its decision to deny the petition for review, I would resolve the case on narrower grounds. As the majority correctly notes, the question before us is whether the BIA abused its discretion when it affirmed the denial of Dekoladenu's motion to reconsider solely because Dekoladenu had overstayed his departure date. See Op. at 3-4 n. 2. Because the INA bars aliens who overstay their periods of voluntary departure from receiving adjustment of status, I would uphold the BIA's decision.

Under the INA, a voluntary departure recipient becomes ineligible for five forms of relief, including adjustment of status, when he over-stays his voluntary departure period:

> If an alien is permitted to depart voluntarily under this section and fails voluntarily ***509** to depart the United States within the time period specified, the alien shall be subject to a civil penalty of not less

> than $ 1,000 and not more than $ 5,000, and be ineligible for a period of 10 years for [voluntary departure, cancellation of removal, adjustment of status, change of nonimmigrant classification, and record of lawful admission].

8 U.S.C. § 1229c(d) (2000). Voluntary departure is only granted if an alien requests it and is notified of the consequences of remaining in the country beyond his departure period. See 8 C.F.R. § 1240.26(b)(1)(i) (An IJ may grant voluntary departure only if the alien "[m]akes such request"); 8 U.S.C. § 1229c(d) ("The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection."). Thus, by express agreement, a voluntary departure recipient accepts the risk that any subsequent motion to reopen seeking voluntary departure, cancellation of removal, adjustment of status, change of nonimmigrant classification, or record of lawful admission will be denied by operation of the voluntary departure date.

In spite of the express consequences of his agreement, Dekoladenu contends that the BIA abused its discretion in affirming the IJ's denial of his motion to reconsider. Specifically, Dekoladenu argues that the BIA's conclusion that a motion to reopen does not toll the running of a voluntary departure period deprives aliens of their right to file a motion to reopen pursuant to 8 U.S.C. § 1229a(c)(6). See 8 U.S.C. § 1229a(c)(6) (2000) ("An alien may file one motion to reopen proceedings under this section."). On these facts, however, Dekoladenu's argument is without merit. Even if Dekoladenu did not relinquish his right to file a motion to reopen when he accepted voluntary departure, he did give up his ability to obtain adjustment of status in the event he overstayed his voluntary departure period. Because

Dekoladenu's motion to reopen was premised solely on a form of relief for which he was ineligible, the IJ's denial of that motion, and his subsequent motion to reconsider, was proper. [FN*] Accordingly, the BIA did not abuse its discretion in affirming the IJ. I therefore concur in the judgment.

FN* In this regard, I agree with the majority's denial of the petition, but not with its pronouncement of a general rule against tolling. Although Dekoladenu became ineligible for adjustment of status when he stayed beyond his departure period, his failure to depart did not render him ineligible for other forms of relief, such as asylum or withholding of removal. Because Dekoladenu moved to reopen solely to request adjustment of status, we need not reach the question of whether tolling is an appropriate means of effectuating an alien's right to file a motion to reopen premised on a ground other than those specifically listed in 8 U.S.C. § 1229c(d).

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A 78 354 375 - Arlington Date: Jun 09 2005

In re: CHRISTOPHER MENSAH DEKOLADENU
IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Randall L. Johnson, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

APPLICATION: Reopening

ORDER:

PER CURIAM. This case is presently before us pursuant to the March 11, 2005, order of the United States

Court of Appeals for the Fourth Circuit granting the government's motion to remand. The government sought a remand for the Board to address the question whether the respondent was provided proper notice of the consequences of failing to voluntarily depart within the voluntary departure time given. See section 240B(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(d). We find that the record before us reflects that the respondent was given proper notice, and the respondent's appeal from the Immigration Judge's denial of his motion to reconsider the denial of his motion to reopen is therefore again denied.

The respondent is in removal proceedings. Section 240B of the Act deals with the issue of voluntary departure in removal proceedings. Section 240B(d) sets forth the consequences to an alien of failing to depart within the time specified, including setting forth all the forms of relief for which the alien becomes ineligible by not timely departing. The section concludes, "[t]he order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection."

The record in the present case reflects that the Immigration Judge issued a form order on March 6, 2003. This order granted the respondent until July 7, 2003, to voluntarily depart. The order also sets forth in detail the consequences of failure to depart within that time, consistent with the statute. The order states that the order was personally served on the respondent. The order was in English, and the record reflects that the respondent, a native and citizen of Ghana, speaks English. The respondent did not depart by July 7, 2003, but rather filed a motion to reopen on that date.

The respondent received adequate and proper written

notice under section 240B(d) of the Act. The filing of the motion does not extend the voluntary departure time. [FN1] The respondent was required to depart or suffer the consequences, of which he had notice, of his failure to depart. Accordingly, the respondent's appeal from the Immigration Judge's denial of his motion to reconsider the denial of the motion to reopen is dismissed.

/S/ *ILLEGIBLE*
FOR THE BOARD

FN1. We note that the United States Court of Appeals for the Ninth Circuit has recently held that where a motion to reopen is filed within the voluntary departure time granted by the Board, the voluntary departure time is tolled while the Board considers the motion. Azarte v. Ashcroft, 394 F.3d 1278 (9th Cir. 2005). The Third Circuit, in a deportation case, has held that a motion to reopen filed within the voluntary departure time constitutes an "exceptional circumstances" forgiving the failure to depart. Barrios v. Attorney General, 399 F.3d 272 (3d Cir. 2005). However, this case arises in the Fourth Circuit.

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A 78 354 375 - Arlington Date: Aug 18 2004

In re: CHRISTOPHER MENSAH DEKOLADENU
IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Randall L. Johnson, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

APPLICATION: Motion to reconsider

ORDER:

PER CURIAM. The respondent has appealed the October 20, 2003, decision of the Immigration Judge

denying his motion to reconsider the Immigration Judge's July 30, 2003, decision denying his motion to reopen the removal proceedings. The respondent has sought reopening in his initial motion filed on July 7, 2003, in order to allow him to apply for adjustment of status based on an approved labor certification and pending employment-based visa petition. The denial of his motion to reopen was based on the fact that the visa petition had not yet been approved and the respondent had failed to depart on or before the July 7, 2003, voluntary departure date set by the Immigration Judge in a March 6, 2003, order. Matter of Shaar, 21 I&N Dec. 541 (BIA 1996); aff'd, Shaar v. INS, 141 F.3d 953 (9th Cir. 1998).

In his motion to reconsider, the respondent asserted that the receipt notice of the visa petition filed on his behalf on December 26, 2002, indicated that it should be adjudicated within 180 days, which would have been at the end of June 2003 and before the expiration of his voluntary departure period. He states that the delay was caused by circumstances beyond his control, and he points out that current regulations allow the concurrent filing of a visa petition and an adjustment application when a visa is immediately available. 8 C.F.R. § 1245.2(a)(2)(i). The Immigration Judge denied the motion to reconsider on the ground that the respondent is ineligible for adjustment of status because he remained in the United States beyond his voluntary departure period. Matter of Shaar, supra.

An alien who has agreed to depart voluntarily under section 240B(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(a)(1), and who remains in the United States after his scheduled departure date is statutorily ineligible for adjustment of status under section 245 of the Act, 8 U.S.C. § 1255, for a period of 10 years. See section 240B(d) of the

Act, 8 U.S.C. § 1229c(d). The respondent argues on appeal that the Immigration Judge erred in not granting his December 30, 2002, motion to terminate or administratively close the proceedings until such time as the visa petition was adjudicated, and instead granting a 4-month period of voluntary departure. However, the respondent, who has been represented by counsel throughout these proceedings, apparently chose to accept a grant of voluntary departure. We note that no appeal was taken from the March 6, 2003, decision. The respondent's filing of a motion to reopen on the last day of his voluntary departure period does not excuse his failure to depart his country in accordance with the grant of voluntary departure. Matter of Shaar, supra. Considering that the respondent knew that he had agreed to leave the United States on or before July 7, 2003, he should have anticipated that the Immigration Judge would not likely be able to reach a decision on the very date the motion was filed. The respondent does not allege that he was granted an extension of the voluntary departure period by the district director. 8 C.F.R. § 1240.26(f).

Accordingly, the appeal is dismissed.

/S/ *ILLEGIBLE*
FOR THE BOARD

APPENDIX E

8 U.S.C. § 1229a(c)(7)(A) provides:

In general.–An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

APPENDIX F

8 U.S.C. § 1229c(d)(1) provides:

In general.–Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien--

> (A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and
>
> (B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.

APPENDIX G

8 C.F.R. § 1003.2(d) provides:

> Departure, deportation, or removal. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.